87-2090

CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MAHENDRA K. JAIN,
PETITIONER

V.

UNIVERSITY OF TENNESSEE AT MARTIN,
RESPONDANT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MAHENDRA K. JAIN
PRO SE PETITIONER
201 Meadowbrook Dr.
Martin, Tenn. 38237
901 587 2153 home
901 587 7363 office

As a pro se petitioner, I most respectfully pray that: (i) a writ of certiorari issue to review the decision of the Sixth Circuit Court of Appeals (6th Cir.) entered on April 6,1988, (ii) time to file the writ extended upto 60 days, (iii) number of pages allowed be increased because so many issues are discussed, and (iv) being a layman, I be permitted to submit written arguments in lieu of oral ones because whatever I have to argue before the Court can be best presented by me in my written brief.

I am not that poor to qualify for forma pauperis and not so rich as to afford very high legal costs which run into hundred thousand dollars.

ABBREVIATIONS

Most of them are given in parentheses after a case, person, rule, etc., is first time stated in this petition.

QUESTIONS PRESENTED

A. MOST IMPORTANT QUESTIONS

1(a) Am I not entitled to litigate in my new suit (Jain II) : (i) pre-1977 conduct of respondant (UTM) under different cause of action? and (ii) post-1977 conduct under Title VII and if permitted under Civil Rights Acts of 1866 and 1871 which became 42 USCA §§ 1981-1983 (§§1981-1983) even if assume, arguendo, not under the Constitution?

(b) Can res judicata bar an independent action under §§1981-1983 and the Constitution, more particularly when (i) my originally made constitutional claims in my pro se complaint in my former suit , D.C. No. 77-1011 (Jain I) adjudicated only under Title VII, /were fraudulently precluded by the officers of the court- my then attorney Neese and UTM attorneys- and they and the court-Judge McRae- did nothing about it and untrue testimony by UTM witnesses in the court, even when timely written, (ii) injuries claimed in Jain II are not identical with those of Jain I, and (iii) Soni Court had held that UTM was not shielded by 11th. amendment during pre-1977 period?

(c) Can 11th. amendment to the U.S. Constitution bar an action against post-1977 conduct of UTM under : (i) Title VII when jurisdiction exists under 2000e-5(f)(1)-(3)? and (ii) one or more sections of §§1981-1983?

Can constitutional violations be used to prove that my prima facie case under Title VII stood unrebutted?

2. Am I to suffer injuries caused by the attorneys and Judge McRae?

OTHER IMPORTANT QUESTIONS

3. When does the time fixed in the rules start- when judgment is entered or when fraud or court's crucial error surfaces?

4(a) Can denial of my motion under one year limit fixed in Rule 60(b) of F.R.C.P.(60(b)), in its clauses (1)-(3) and applicable only to Jain I, bar me to invoke its clause (6) and saving clause in Jain II?

(b) Does conduct of Neese(given on pages ii, xix-xxiv,xxvi-xxviii, 11,12) not violate clause (6) and saving

clause of 60(b) ?

(c) Does each of the following by itself not come under saving clause of 60(b) ?

(i) False promise UTM made to Neese (thereby to me through him) after Jain I decision because of which Neese made me drop Jain I.

(ii) Conduct of UTM attorneys (given on pages ii,xix-xxiv,xxviii,15,16).

(iii) Untrue testimony by UTM witnesses in the court (not in pretrial discovery Neese did not conduct).

(iv) Judge McRae's actions (given on pages xxiv,xxv,xxvi,17-19)

(d) Does each of the following factors by itself not come under clause (6) of 60(b) ?

Extraordinary circumstances, my extreme fear of the courts stemming from my belief(which is becoming discernible and if my writ is denied it may only affirm my belief) that I cannot prevail because of

my being non-anglo-saxon no-rich layman unrepresented by an attorney and UTM having so much clout, wealth, and political backing, my fear only heightened by Judge McRae in 1978, my acting on the advice of my attorney, my freedom of action severely restricted by economic and other conditions (most unsurmountable being one imposed by Judge McRae in 1978), my de facto having no counsel to advise me (Neese neither recused himself nor advised me of time limits fixed in the rules even when I asked for such determination).

5. Under Rule 54(b) of F.R.C.P. (54(b)) when less than all my claims originally presented were adjudicated in Jain I and there was no determination and direction from the court: (i) was judgment in it appealable? and (ii) has it terminated yet?

6(a) When Jain II was filed in August 1981 under the Constitution, etc.,UTM in its 1982 motion to dismiss and 1983 proposed pretrial

order did not invoke sovereign immunity, and Jain II was continued in July 1983 by Judge McRae, should Jain II be decided on the basis of those filings or something UTM claimed in 1986 after its motion to dismiss was denied?

(b) Am I to suffer because of long delay of five years by the court to rule on pending motions in Jain II?

(c) Do the following facts entitle UTM to defense of sovereign immunity?

It is"state-aided (as given in faculty handbooks)" land grant (land granted by federal govt.) university whose indebtedness does not become indebtedness of the state, which has private money earned in interest each year (it keeps and does not turn in to the state treasury), it carried liability insurance until 1986, it still can sue and be sued, state gives it aid on fixed ratio per student, its faculty is covered by private retirement and not state

retirement, it has its own legal department which is not under state attorney general, its Board of Trustees are appointed by the governor (but contrary to the court's holding they are not confirmed by the state senate), its Board has included a student member elected by the students without any action by the state, in 1984 the state effected a waver and formed Board of Claims to hear liability that includes civil and constitutional violations and determine damages, the state has another board- Board of Regents- which administers all the state institutions.

(d) If the answer to (c) above is no, should the court decisions, fraudulently obtained through nondisclosure of those facts to the courts by UTM attorneys and officials influence the court decision in Jain II?

7(a) Can state legislation, adopted after the federal court decisions established

a federal law that the university did not have immunity under eleventh amendment, frustrate full effectiveness of that federal law?

(b) Has UTM not succeeded in depriving me of my constitutional right under the color of state legislation and as such violating § 1983?

P A R T I E S

PETITIONER (PLAINTIFF): MAHENDRA K. JAIN , REFERRED TO AS I

RESPONDANT (DEFENDANT): UNIVERSITY OF TENNESSEE AT MARTIN

REFERRED TO AS UTM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

LAW BOOKS

STATUTES, RULES, ADVISORY COMMITTEE NOTES (ACN), ETC. USED ARE GIVEN ON PAGES xiii-xv.

STATUTORY AND OTHER PROVISIONS INVOLVED

2000e-2 of Title VII: ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

2000e-3: it shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made unlawful by (2000e-2), or because he has made a charge... under (2000e-2).

Rule 60(b) of F.R.C.P.: ... (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1),(2), and (3) not more than one year after the judgment was entered... This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment,..., or to set aside the judgment for fraud upon the court.

Rule 54(b) of F.R.C.P.: When more than one claim for relief is presented in an action... the court may direct the entry of a final judgment upon one or more but less than all the claims only upon the express determination that there is no just reason for delay and upon express direction for the entry of the judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of

judgment adjudicating all the claims.

ADVISORY COMMITTEE NOTES (ACN) ON SUB-DIVISION 60(b) : Two types of procedures to obtain relief from judgment are specified in the rules as it is proposed to amend them. One procedure is by motion in the court and in the action in which judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment... If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside the judgment.

RES JUDICATA: To be applicable requires identity in things sued for as well as identity of cause of action.

§ 1981
42 U.S.C.A. / : All persons within the jurisdiction of the United States have the same right in every state ...as is enjoyed by white citizens.

The 1871 Civil Rights Statute (§1983): is addressed only to state and to those acting under the color of state authority while the Act of 1866 extends in some respects to acts of private discrimination, Mohone v. Wadah, C.A.Pa 1977,564 F 2d. 1018, cert. den. 98 S.Ct. 3122,436 U.S. 90, 57 L.Ed. 2d.1147
Every person who, under the color of any statute... of any state ...subjects,or causes to be subjected, any citizen of the United States,or other person within the jurisdiction there of to the deprivation of any rights...secured by the Constitution and laws, shall be liable to the party

injured in an action at law, suit in equity or other proceeding for redress.

RULE 54(C) OF FRCP:/(Eventhough for prevailing party but could be constued to include a person who can prevail if such provision is extended to him) it provides that a court grant relief to which a person is entitled to even if he has not sought such relief.

RULE 8(b)(d) OF FRCP: It provides that undenied averments become admitted facts.

FIRST AMENTMENT: Freedom of speech guaranteed.

FIFTH AMENDMENT: Guarantees due process and possibly equal protection of laws.

FOURTEENTH AMENDMENT: Guarantees equal protection of laws.

VIOLATIONS OF RULES 5 AND 8 OF THE U.S.SUPREME COURT AND ABA CODES BY UTM COUNSELS

They, being full time officers of the university and claiming it to be a state, have not acted according to the above rules and ABA Codes DR 7-102(A)(B) and EC 7-14. These codes require an attorney:

not to conceal or knowingly fail to disclose that which is required by law to reveal, not knowingly use perjured testimony or false evidence, not knowingly make a false statement of law or fact;

a govt. lawyer in a civil action...seek justice and to develop a full and fair record, and not use his position or economic power of the govt. to harass parties or bring about unjust settlements or results;

A lawyer who receives information clearly establishing his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall call upon his client to rectify the same and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal...

They have misled the courts by disclosing to them as little as they wanted, even precluding my originally made constitutional claims in Jain I, filed tempered evidence,

marshaled heavy weight of testimony by UTM officials, who did not testify truthfully in the court, did nothing when such testimony was timely brought to their attention.

They and UTM officials, with their backing, have been defying oral rulings in Jain I on my performance, teaching and research abilities, communication, etc.

Yet they would be appearing in the U.S. Supreme Court to mislead it as they have done in other cases.

They are continuing to do so because the courts have been looking the other way even when their conduct has been brought to their attention in spite of the U.S. Supreme Court ruling, specifically based on ABA Code DR-7-102, in 1975 in Geders v. U.S. 96 S.Ct. 1330, 425 US 80, 47 L.Ed 592.

Their conduct will be discussed later.

I pray the Supreme Court to read my brief very closely and review all the questions raised and the facts presented

by me and not rely that much on their brief .

PROCEDURES FOLLOWED BY ME IN THE TWO SUITS

A. JAIN I

On receipt of right to sue, I filed it myself. In my complaint and motion not to dismiss, I claimed foreign origin discrimination violative of Title VII, citizenship requirement violative of 14th. amendment, and retaliation violative of Title VII and 1st. amendment, and prayed the court to appoint an attorney and authorize commencement of suit without payment of costs, etc.

In its motion to dismiss and Answer, UTM admitted my foreign origin claim, did not contest that it was not national origin, and denied violating my civil or constitutional rights.

In April 1977, the Chief Judge in denying motion to dismiss seems to have accepted

foreign origin as national origin of Title VII and not precluded my constitutional claims made in Jain I.

When I retained Mr. Neese in May 1977, he agreed to pursue Jain I under Title VII and the Constitution both.

Therefore at the time of pretrial conference, all the attorneys and the court were fully aware of my claim of foreign as national and my constitutional claims. Yet Mr. Neese (against my plea), UTM attorneys, and Judge McRae precluded my originally made constitutional claims from cause of action in Jain I.

Judge McRae did not advise me at the front end that I had to prove Indian and not foreign origin discrimination which made Jain I a game of chess.

Mr. Neese silenced me by saying that I should be interested in winning the suit and not on what grounds.

UTM counsels, knowing that the state

was immunizing UTM in 1977 which would not apply to already filed Jain I, deliberately planned and carefully executed their scheme, with Neese's connivance and Judge McRae's deference to them, to preclude my originally made constitutional claims to deprive me of justice and such remedy.

From 1976 findings of UTM attorney Rhea and certain documents, they knew fully well that I would certainly prove constitutional violations which is also evident from court's oral ruling. Therfore they precluded my constitutional claims so that I am not only deprived of constitutional remedies for pre-1977 conduct of UTM but may not be able to seek them later through a new suit after 1977.

Even with such fraud, I would have prevailed but for the facts: (i) Judge McRae made many errors, crucial error of paying no attention to 1972 EEOC communication to UTM (UTM identified me

as complainant to EEOC) causing my failure to prevail under 2000e-3 surfaced in his 1980 order in Jain I, (ii) he called findings of UTM attorney Rhea my undertaking more that what I could prove, (iii) even when he was shocked and surprised at "so many inconsistencies" in testimony of UTM officials, UTM's marshalling such heavy weight of their testimony weighed heavily over my lone testimony, (iv) he did not shift burden of production to UTM after I had made prima facie case of Title VII violations, (v) Neese did not conduct any discovery, did not talk to people to line up witnesses, did not seek certain documents from UTM , did not present to the court certain documents I had given him to rebut certain claims made by UTM, did not bring to court's attention certain laws and decided cases, practically said nothing in his closing arguments, etc. ,(vi) UTM attorneys and officials misled the court; etc.

On December 6,1977, judgment was entered and Neese told me to drop Jain I because UTM Chancellor McGehee after the court decision promised him that he would personally see that I had no more problem at UTM.

When I pointed out to Neese that UTM officials had not testified truthfully in the court and retaliatory part of Jain I had not received proper attention of the court, he replied / that UTM witnesses were sitting in the court lying but they did not commit perjury (fooling me to protect them) and he could file in the court all the retaliatory actions of UTM but would not do so in order not to jeopardize McGehee's promise to him.

I advised McGehee in December 1977 and Leadbetter in April 1978 that I had dropped Jain I on advice from Neese because of McGehee's promise to him (stating that promise). None of them advised me that no promise was made or binding on UTM. They

had therefore put their tacit seal of approval on that promise of compromise proved to be false in 1979.

In December 1977, Neese wrote me to adopt wait-and-see policy, forget the suit, and he would successfully institute a new proceeding if UTM retaliated against me any more.

In January 1978, I wrote Neese to make a determination if constitutional violations, untrue testimony of UTM people, etc., could be kept in abeyance until 1979 in case I had to go back to court if not promoted.

I also wrote that UTM could be asked to change its plea by agreeing to my promotion in 1978 because of untrue testimony or the judge may be prayed to grant me relief under the Constitution, which was included in my original complaint, and because of untrue testimony by UTM people.

Neese did not reply. When I met him

later, he again made me drop Jain I because of McGehee's promise, told me that UTM this time would live upto its promise because it was made to him, and I go directly to him if I was not promoted in 1979 and he would take care of the matter.

When I had time to pursue the matter, he made me drop Jain I and did not advise me of time limits fixed in the rules or I go to another attorney.

He even delayed obtaining court's oral ruling received by me late in April 1978.

I remained quite until I received Bill of Costs wrongly taxed on me and UTM had paid no fee to its officials who testified in the court. I contested the costs. I wrote Leadbetter (April 1978), court clerks (June and July 1978, with copy to McRae and Leadbetter), and Judge McRae (July 1978).

These letters were written within one year of entry of judgment. In them, I brought to their attention untrue testimony

of UTM officials in the court , preclusion of my originally made constitutional claims during pretrial conference, retaliatory part of Jain I not getting proper consideration by the court.

I wrote that I would submit all the details if Judge McRae was willing to review his ruling as it was no use burdening the letter with those details otherwise.

In my letter to Judge McRae, I clearly expressed my fear that my letter may irritate him. Instead of allaying it and give me an opportunity to fully exhibit Jain I under the Constitution and untrue testimony of UTM people, he wrote snappy letter (only heightening my already existing extreme fear of the courts) to Dy. Clerk Clifft in August 1978 certifying that he was unwilling to change his ruling, he had read my letter in its entirety, he regretted that I was unwilling to accept his ruling without hard feelings but he was bound by the law and

his interpretation of it .

I thus faced unpenetrable stone wall in my efforts to seek justice and constitutional rights and was left with no choice but to stop not knowing as a layman whatelse to do .

I wrote Neese around January 1979 expressing my fear that UTM was going to deny me promotion using a committee. He wrote me that I wait for committee decision.

In February 1979, he agreed to file a new suit after the committee denied me promotion recommendation and UTM making untrue claim, that the committee had not reached its decision before my letter reached its chairman Foote, discontinued consideration of my promotion as a punitive measure.

In June 1979, he advised me to put UTM on notice that we were dead serious to go to court if I was not promoted and he would call McGehee to tell him that such

a letter was coming to him from me.

Neese did not file the new suit and wrote me in August 1979 that if I wanted to pursue my remedy in court and had another attorney he would share with him any inside information he may have.

He has not shared that information with me even when I asked for it writing him that I was proceeding pro se.

It is worth mentioning that Neese did not give me that advice in 1977 or 1978 when I had time to pursue the matter. He did not give me that advice in January 1979 when only 13 months had elasped since the entry of judgment and less than one year since Judge McRae wrote Clifft in August 1978 and I may have been able to pursuade the courts to wave that extra month.

THUS IT IS QUITE EVIDENT THAT NEESE STALLED THE MATTER UNTIL HE WAS SURE THAT ALL TIME LIMITS FIXED IN THE RULES HAD EXPIRED THUS PROTECTING HIMSELF AND UTM.

Not knowing what to do and not knowing 60(b) at all, I pursued my appeal with the Board of Trustees of the university which was denied in February 1980 on the recommendation of its counsel Brogan. UTM denied me promotion in 1980 a second time.

Then I filed my motion in Jain I in April 1980 with copies to Leadbetter and NEESE to enable Neese to deny any statement in my brief.

They filed their responses only after directed by Judge McRae, probably after time/file to the same expired. It is not known why they were directed to file the response rather than grant my motion by default.

Both of them claimed that my motion was time-barred. None of them disclosed clause (6) and saving clause of 60(b).

Judge McRae in denying my motion under one year limit fixed in the rule (in clauses (1)-(3) only) quoted 60(b) as paraphrased by Leadbetter, thereby not disclos-

ing those two clauses. He did not grant me relief under clause (6) when as a judge he knew that conduct of Neese and his own action of 1978 came under it and not under clauses (1)-(3). He knew that I was not being assisted by an attorney and my filing indicated that I was unaware of 60(b).

The Appeals Court held that Judge McRae had not abused his discretion under one year limit fixed in 60(b). It also did not give clause (6) and saving clause and relief under clause (6).

No judge asked for a vote for en banc rehearing.

B. JAIN II

In August 1981, I filed it bringing pre and post 1977 conduct of UTM under the Constitution and §§1981 & 1983. In January 1982, UTM filed motion to dismiss claiming res judicata and statute of limitations.

It did admit : (i) cause of action in Jain II differed from that of Jain I and

(ii) I was entitled to seek constitutional remedies.

In February 1982, I filed my response. In my June 1982 memorandum opposing UTM motion to dismiss, I claimed that res judicata was inapplicable because cause of action was not same and statute of limitation was inapplicable because the actions were continuing.

IN AUGUST 1982, I GOT HOLD OF BULLOCH CASE FROM WHICH I LEARNT FIRST TIME 60(b) IN ITS ENTIRETY AND WHAT WOULD CONSTITUTE FRAUD ON THE COURT.

Using Bulloch case material, I filed in September 1982 my motion seeking relief in Jain II from operation of judgment in Jain I under clause (6) and saving clause of 60 (b).

In May 1983, I received right to sue from EEOC based on my complaint filed with it clearly stating that I had already filed Jain II.

I immediately filed consolidated set of amended written pleadings explicitly bringing post-1977 conduct of UTM under Title VII also and advancing a new legal theory based on Rule 54(b) of F.R.C.P. that Jain I may not yet have terminated.

In May 1983, I wrote Judge McRae, with copy to Leadbetter, informing them that E.E.O.C. had issued me right to sue.

The trial was set for August 1983. I filed my proposed pretrial order again explicitly bringing post-1977 conduct of UTM under Title VII also. In July 1983, UTM filed its proposed pretrial order.

Neither in its 1982 motion to dismiss nor in its proposed pretrial order UTM invoked sovereign immunity.

In July 1983, Judge McRae wrote us that Jain II had remained untouched, he would rule on pending motions, and the case would be continued.

When more than one year passed with the

suit going nowhere and Leadbetter not furnishing answers to interrogatories, I wrote Judge McRae bringing the matter to his attention. In July 1984, he wrote me very intimidating letter calling my claims and efforts my inaccurate accusations and obsessive behavior in spite of not having ruled on pending motions required of him.

Getting scared, I wrote the Chief Judge of 6th Cir. with a copy of Judge McRae's letter. Judge Lively replied my letter in a perfunctory manner.

In May 1986, Judge Todd denied : (i) me my right to litigate pre-1977 conduct of UTM imposing res judicata, (ii) my motion seeking relief in Jain II from operation of judgment in Jain I under 60(b), (iii) UTM motion to dismiss to the extent of post-1977 conduct. He did not rule on my new legal theory based on 54(b).

I filed my brief for reconsideration. UTM filed second motion to dismiss first

time invoking sovereign immunity.

In my memorandum opposing second motion to dismiss and in subsequent briefs, I have repeatedly pointed out the fact that post-1977 conduct was pursued under Title VII also and I had received right to sue for it from E.E.O.C. and jurisdiction exists under 2000e-5(f)(1)-(3) but of no avail.

Being burnt in the past and afraid of being denied the right to appeal May 1986 order of Judge Todd(based on past decisions of the courts), I mailed typed pages to the courts and Leadbetter very clearly putting the condition that they be taken as notice of appeal only if I was wrong in my interpretation that an appeal could not be pursued piecemeal and I had to pursue the appeal right then without waiting for adjudication of remaining issue.

Mr. Leadbetter remained silent. I merely followed the instructions received from the courts.

Rather than placing my appeal on hold, as prayed in reply brief, 6th Cir. held that it lacked jurisdiction because remaining issue was not adjudicated during pendency of the appeal.

UNDER THE CIRCUMSTANCES, I CANNOT BE DENIED MY RIGHT TO APPEAL MAY 1986 ORDER OF JUDGE TODD.

In August 1987, the district court granted UTM's motion for summary judgment in sipte of my repeated assertion that jurisdiction existed under 2000e-5(f)(1)-(3), quoting Judge Nixon (mid Tenn) in Ford v. Mid. Tenn. St. Univ. and the fact that UTM has privite money earned as interest which it keeps and does not turn in to state treasury.

In August 1986, Judge Todd had denied UTM's second motion to dismiss but had left door open for it to file motion for summary judgment if it could show that the award / money will come from state.

C. JAIN II IN APPEALS COURT

In my notice of appeal, pre-argument statement, answers to pro se appellant's brief, petition for hearing and reply brief, I have clearly pointed out that the appeal is taken from May 1986 order and August 1987 judgment of the district court and have made four Arguments.

In the Fourth Argument, I also pointed out that even if the courts ultimately hold that UTM has sovereign immunity that would not bar an action against post-1977 conduct under Title VII.

Yet 6th Cir. narrowed its review to single weak issue of sovereign immunity and did not review all other issues of much greater importance given in the four Arguments. It seems to have read UTM's brief and none of my filings.

On April 8,1988, on receipt of Panel decision, I wrote Clerk Hehman requesting him to let me know the number of copies

of petition for en banc rehearing required if to be filed and/possible extention of time.

When I did not hear from him, I mailed 10 copies of the same(my best guess) on April 21,1988, prior to receipt of denial of extension of time. That was 14th. day of receipt of the Panel decision.

Those 10 copies were returned to me without filing. The same day I filed petition for reconsideration of denial of extension of time claiming that I should have been notified number of copies required to be filed and denial of extension of time prior to expiration of time/to file the petition for en banc rehearing.

The Panel denied my petition for reconsideration on May 16,1988 thus depriving me any opportnity to have en banc rehearing and only door left for me to knock is the Supreme Court. I believe I was entitled to have been timely informed of denial of extension of time.

The way I was not even timely informed of denial of extension of time, etc., and then inflexibility suggest annoynace of the courts with me punishing me with denial of en banc hearing since writ is not a matter of right and many writs are denied. IN 1980 in Jain I, 6th Cir Clerk routinely extended the time to file petition for hearing.

Mr. Rhea once told me that my letters had turned UTM people against me because they did not understand that I meant no harm but merely wanted to present my concerns. It seems that the courts have turned against me the same way.

I feared that taking advantage of my being a layman, Jain II could be dismissed by rejecting my request after I went out of the country and as such I did not go to India when my both parents died in 1984. That was most traumatic experience of my life.

CREDIBILITY AND DOUBLE STANDARDS FOLLOWED BY THE DISTRICT COURTS

All the facts, including those taken from Jain I trial, to seek relief from judgment were presented to the district court under oath in Jain I and then to 6th Cir. Neither the respondants, Including Neese, denied nor the courts rejected any of them.

The respondants claimed that my motion was barred by one year limit of 60(b) and the courts upheld it.

Those facts were stated and restated under oath in Jain II. My credibility was established when I was intensely grilled by UTM attorneys during pretrial deposition and trial testimony in Jain I.

This can hardly be said about UTM officials and attorneys. Their conduct is given on preceding pages and on 15,16,17.

UTM officials and attorneys do not hesitate to make untrue claims. In 1979, they claimed that the committee had not

reached its decision on my promotion before my letter reached its chairman Foote. In 1986, its attorneys finally conceded that the committee in 1979 had decided not to recommend my promotion.

In 6th Cir. in Jain I, Leadbetter claimed that I had not followed appeal procedures when I had followed them correctly.

There seems to be double standards in the district courts. It granted UTM motion for summary judgment accepting affidavit of Mr. Fly even when I pointed out many undisclosed facts in it as given on pagevi.

UTM denied none of the facts given by me under oath and undenied averments become admitted facts under Rule 8(b)(d).

Whereas the court allowed UTM to file for summary judgment(A-16) when record was lacking, it dismissed my motion saying I offered no proof (A-13) rather than permit me also to file additional proof if it was not satisfied with the record and proof.

OFFICIAL REPORT OF THE CASE

The decision of 6th Cir was entered on April 6,1988, and appears in the Appendix hereto. Mandate issued on May 26 ,1988

The district court order of May 28, 1986, and judgment of August 18,1987, appear in Appendix hereto.

GROUNDS FOR INVOKING JURISDICTION AND IMPORTANCE OF GRANTING THE WRIT

Jurisdiction is conferred by 28 U.S.C. §§ 1254(1) and 2101 (c), etc.

In its order of May 1986, the district court erroneously held that: (i) res judicata barred me to litigate pre-1977 conduct of UTM through Jain II under different cause of action, (ii) none of the factors given in question 4 comes under clause (6) and/ or saving clause of 60(b) and as such denied me relief in Jain II from judgment in Jain I. It did not rule on my new legal theory based on 54(b).

In its August 1987 judgment, it

dismissed Jain II thereby dismissed all my claims made in it, not merely that on sovereign immunity, including the claim that post-1977 conduct was being litigated under Title VII for which I have received right to sue from EEOC.

EVEN THOUGH THE APPEAL WAS TAKEN BOTH FROM MAY 1986 ORDER AND AUGUST 1987 JUDGMENT, 6th. Cir. RENDERED A DECISION ON SINGLE (WEAKEST) ISSUE OF SOVEREIGN IMMUNITY.

It seems that it has only read UTM brief (in which its attorneys misled the court by saying that post-1977 conduct was not brought pursuant to Title VII and unilaterally and deliberately narrowing my appeal to single weak issue of sovereign immunity and precluding more important issues) and none of my filings.

It then denied me any opportunity for en banc review in a manner given on pages xxxv, xxxvi and xxxvii.

I have been deprived of justice and

fair results, de facto stolen from me, because of the conducts of the attorneys and the courts.

They narrowed Jain I to Title VII precluding stronger remedy under the Constitution and then did nothing when the matters were timely brought to their attention.

They narrowed Jain II to the Constitution not listening to my claim that Title VII remedy was also sought for post-1977 conduct

It becomes discernible that they have in both cases picked such remedies and such statements, even having misconstrued some of them, that assured my failure to prevail in them. They precluded such remedy and paid no attention to such statements that would have led to decisions favorable to me.

The court's reliance on Bulloch and H.K. Porter is misplaced. It gave no consideration to so many other cases cited by me. It failed to find direction from

Alexander and Davis and give consideration to other cases cited that res judicata is not a bar, more particularly when my constitutional claims were fraudulently precluded in Jain I.

DENIAL OF PETITION WILL CERTAINLY RESULT IN:

(i) miscarriage of justice due to a decision, based on review of single weak issue, which is contrary to all the authoriites and rules given in Table of Authorities and Statutory AND Other Provisions involved (pages x to xv).

(ii) Depriving me of the court of last resort where I can present discriminatory and retaliatory actions of the courts because of my being non-anglo-saxon layman unrepresented by an attorney and my persistence to seek relief from them and my writing to the chief judge (a member of the Panel) about Judge McRae's 1984 letter to me.

(iii) UTM not deprived of its ill-gotten

gains through fraud on the courts by the attorneys.

(iv) Affirmation that pro se litigants can hardly succeed even if the Supreme Court permitted to proceed without attorney.

REASONS FOR GRANTING THE WRIT

RES JUDICATA

I have repeatedly pointed out that the court's determination in Jain I that UTM's discriminatory and retaliatory conduct did not violate Title VII in no implies that it does not violate other provisions.

Yet the courts have been repeatedly saying that UTM's conduct was neither retaliatory or discriminatory.

Res Judicata: To be applicable requires identity of both cause of action and things sued for (page xiv).

6th Cir. (A-6) accepts injuries suffered for which relief is sought as things sued for.

Judge McRae in Jain I, after the trial,

held that discrimination because of foreign origin and lacking citizenship was not same as Indian origin and retaliation because of complaining of discrimination, etc., was not same as that based on filing complaint with EEOC.

It is because he held those two types of injuries were not same, he ruled that (i) while I was discriminated because I was not an American citizen and from a foreign country I had not proved Indian origin discrimination and (ii) while I was entitled to better treatment that was not something based on my complaint to EEOC.

The court (A-6) implied that "evidence necessary to sustain each action" is same.

The evidence needed to sustain action in Jain II was not able to sustain Jain I otherwise I would have prevailed in Jain I and would not be going through the trauma of Jain II.

Therefore evidence necessary to .

sustain different injuries of the two suits are not same.

The district court erroreously held that both suits are based on same discriminatory acts. Foreign is not Indian, etc.

Even if the facts and acts are same, discrimination and retaliation arising out of them in both suits are not same and judgment on one is not a bar to a suit upon another. This is so evident from Woodbury v. Porter (page xii)

> ...mere fact that the same evidence may be admissible...in each action is not controlling, but even though the evidence may be admissible and it is in part the same, but subject matter is different the actions are not identical. The mere fact that different demands may spring out of same act or contract does not itself render a judgment on one a bar to a suit upon another.

See also FTC v. Motion Picture Adv. Ser. Co. ((1953) 344, US 392), United Shoe Machinery Co. v. U.S. (258 US 451(1922)), Mancuso v. U.S. (464 Fed 2d. 1273(1972)), Boykins v. Ambridge Area Sch. Dist (621 Fed.

2d. 75(1980)), Cullen v. New York Civ. Ser. Comm. (435 Fed Supp. 546(1977)), In these cases acts have been same but two different suits were pursued under different remedies and res judicata was not a bar in any of the above and other cases.

The clearest case is Tramb v. Converter Ink Co. (D.C. I II 1972, 343 F. Supp. 1350). The court held that failure of plaintiff to prosecute under sec. 2000 et. seq. of Title VII, his suit based on alleged racial discrimination did not bar suit under § 1981.

THIS IS MOST IMPORTANT CASE. RES JUDICATA WHEN WAS NOT A BAR EVEN / INJURIES(RACIAL DISCRIMINATION) WERE THE SAME.

In Griffin v. State Bd. of Ed. D.C. Va 1969,296 F.Supp. 1178, the court held that previous decree upholding the validity of tution grant system for private schools could be reopened as a result of intervening edicts of the Supreme Court in similar

cases and res judicata would not prevent holding that the system violated the federal constitution .

This case needs to be taken in light of the facts:

(i) As a layman I was misled into believing that I was not entitled to remedies other than Title VII. It was based on the Jain I court ruling that:

> Now, sometimes Courts are faced with problems where the facts presented may seem inequitable from one standpoint, but I am at all times bound by the law in the interpreting courts ,

some other rulings in it, Neese's telling me that constitution was inapplicable, and Judge McRae's August 1978 letter to Clifft that :

> I regret that Dr. Jain is unable to accept the rulings of the Court without...hard feelings. However, I feel that I am bound to follow the law and my interpretation of it, etc.

In my July 1978 letter to McRae, I had very clearly pointed out preclusion of my constitutional right in pretrial

conference.

(ii)The appeal was not timely taken in Jain I because of promise UTM made to Neese and Neese made to me and he advised me to drop Jain I because of UTM promise.

(iii) Only Supreme Court rulings in Davis v. Passman (442 US 226(1979)), Givhan v. West Consolidated Sch. Dist. (77-1051,99 S. Ct. 693(1979)), Texas Dept. of Comm. Affairs v. Burdene (page xii), Fitzpatrick(page x), , court ruling in Ford et al. v. Mid. Tenn st. Univ (6th Cir. No. 83-5330), made clear to me that I was entitled to constitutional remedies in Jain I, burden of production must have shifted to UTM after I had made prima facie case under Title VII.

6th Cir. ruling in Woodruff v. Tomlin came in 1980 which established what acts of an attorney would constitute his gross negligence.

The cause of action is not identical in both suit. In fact UTM in motion to dismiss

admitted that it/differed from that of Jain in Jain II I. Furthermore, it were the attorneys and Judge McRae who in Jain I made cause of action to be Title VII only when they precluded from it my constitutional claims.

Cause of action in Jain II for pre-1977 conduct is the Constitution and SS 1981-1983.

The district court erroneously rejected my claim that Jain II is a new and independent suit. While admitting that my "characterization of the Supreme Court holdings in " Alexander and Davis are not inaccurate, it held that the Supreme Court " in those cases did not address the preclusive effect of a Title VII action on a later action based upon a different legal theory but same operative facts."

As stated above, the facts and acts may be same but injuries sustained are not identical.

Supreme Court in Alexander held that a person is allowed independently to pursue

his remedies both under Title VII and any other applicable federal...statute relative to employment discrimination.

"Independently" and "both" can in no way imply that res judicata would bar a suit under independent remedy after failing under Title VII which is so clearly evident from Tramb (page 4).

In Johnson v. Ryder Truck Lines (C.A.N.C. 1978,575 F.2d.471 Cer. den. 99 S.Ct.1785, 440 US 979,60 L.Ed 2d.239)the court held:

> §1981 affords federal remedy that is separate, distinct, and independent from remedy available under sec.2000 et seq.

Remedies under §1981 is separate from and independent of other remedy such as sec. 2000 et seq. or § 1983. Citron v. Jackson State Univ.(D.C. Miss.1977,456 F. Supp.3, affirmed 577 F.2d. 1132).

Davis Court held that a person not protected by Title VII is entitled to seek constitutional remedies.

Therefore a determination ought to have been made at the front end before the trial

whether or not I was covered by Title VII because of my claim of foreign origin discrimination so clearly stated in my in Jain I complaint/and then motion not to dismiss.

Such determination was made in oral ruling after the trial. It then became essential for me to go for other remedy.

It becomes abundantly clear that res judicata does not bar me to litigate pre-1977 conduct of UTH under §§1981-1983 and the Constitution, more particularly it were court and its officers who precluded in Jain I my originally made constitutional claims, taking advantage of my/being a layman, and then they did nothing when such preclusion was timely brought to their attention.

I MAY CLEARLY POINT OUT THAT SOVEREIGN IMMUNITY WAS INAPPLICABLE TO JAIN I AND AS SUCH IN GIVEN CONDITIONS, IT SHOULD BE MADE INAPPLICABLE TO PRE-1977 CONDUCT BEING LITIGATED THROUGH JAIN II. IT IS POSSIBLE THAT UNDER RULE 54(b) JAIN I MAY NOT YET

have terminated.

Furthermore, 6th Cir. in Jain II also called my claim of foreign origin as national origin and if it in 1988 holds that both are same then its edicts of 1988 would make Judge McRae's ruling in Jain I that they were not same/can be reopened and res judicata would not be a bar under Griffin (page 4)

RULE 54(b) OF F.R. C.P.

Constitutional claims and denial of graduate deanship in Jain I were not adjudicated and as such less than all my claims presented in it were adjudicated.

Therefore Jain I may not have been appealable. Since there was lack of determination and direction by the court, it may not terminate until all those remaining claims are adjudicated now through Jain II because Jain I is declared closed.

CLAUSE (6) AND SAVING CLAUSE OF 60(b)

Under ACN (page xiv) my only other

procedural remedy is through a new suit (Jain II) after I lost my right to make a motion in Jain I under one year limit of 60(b) fixed in its clauses (1)-(3).

Clause (6) does not say that it could not be used in a new suit with saving clause.

The Supreme Court in Polites v. U.S. (1960,81 S.Ct. 202,206,364 US 426,433,5, L.Ed. 2d. 173) made the statement that:

> ..[w]e need not go so far here to decide that when an appeal has ...not been taken because of clearly applicable adverse rule of law, relief under Rule 60(b)(6) is inflexible to be withheld when there has later been a clear and authoritative change in governing law.

As stated on pages 5,6 , I was misled and clarity came in Burdene.

CONDUCT OF MR. NEESE

His conduct (given on pagesii, xix, xx, xxi-xxiv, xxvi-xxviii) / come under clause (6) and saving clause of 60(b), more particularly when I was always diligent. The courts have erroneously called his conduct of gross neglect my dissatisfaction with him.

In Jain I he told me that UTM had conceded on my degrees and communication and those issues could not be raised by UTM during the trial. But he/neither raised any objection nor presented rebutting documents to the court when UTM attorneys sneaked both issues through the testimony of their witnesses which prejudiced the court.

King v. Mordowence (D.C.R.F. 1969,46 F.R.D. 474):

gross neglect of plaintiff's attorney, of which plaintiff was unaware, coupled with absence of neglect on the part of plaintiff, constituted more than "excusable neglect" of 60(b)(1) and permitted relief under 60(b)(6).

L.P. Steuart v. Matthews (CA 1964,329F. 2d.234,117 US App. D.C. 279):

personal problems of counsel caused him grossly neglect the case of diligent client was any other reason of 60(b).

McKinney v. Boyle (CA 9th.1968,404 F. 2d. 632, 89 S.Ct. 1481, 394 US 992 , 22 L. Ed. 2d. 769):

Fraud on the part of a party's own attorney does not come under Rule 60(b)(3) and relief is available under 60(b)(6) even though more than one year has passed .

U.S. v. Throckmorton (98 US 61 (1878)):

where the unsuccessful party has been prevented from fully exhibiting his case,.. a false promise of compromise, or where an attorney fraudulently assumes to represent a party and connives at his defeat... these and similar cases which show there has never been a real contest in the trial of a case.

"similar" indicates that a case has not to fit exactly.

There was no real contest and I was prevented from fully exhibiting Jain I because my constitutional claims were precluded by the court and its officers.

None of the attorneys brought to court's attention most crucial fact that UTM in January 1971 decided to renew my contract for 1971-72 on regular basis but in summer of 1971 it left me again on temporary basis while hiring two new people on regular basis. Such action proved national origin discrimination

OTHER FACTORS UNDER CLAUSE (6)

Re Cremidas' Estate (D.C. Alaska 1953, 14 F.R.D. 15,14 Alaska 234):

delay of more than three years did not bar the motion when the party's freedom of action was severely restricted by economic and other conditions and he had no counsel to advise him.

See also U.S. v. Karahalias CA 2d. 953, 205 F. 2d. 33.

The greatest obstacle was imposed by Judge McRae's 1978 actions. I had no money on my low salary. I acted on the advice of my counsel under promise UTM made to him and he made to me. He neither recused himself nor advised me of time limits fixed in rules, even when I wrote him, or ask me to go to another attorney (page xxvii).

SAVING CLAUSE

FALSE PROMISE AND MY EXTREME FEAR

In my letter of July 1978 expressing my fear to Judge McRae, I did not go that far to state my belief (page iv,v).

It is because of that fear of not getting justice, I stopped after Judge McRae's 1978 actions asking the question : WHAT IF THE APPEALS COURT DENIED MY APPEAL(AS IS HAPPEN-

ING NOW) AND I JEOPARDIZED PROMISES MADE?

Besides the promise stated on page xxii, xxiii, Dr. Simmons promised me in May 1976 that he would recommend my promotion in 1979. UTM was not relieved of the promise it made when the court ruled in Jain I:

> I didn't rule that Dr. Jain couldn't be given some consideration other than what has already been promised him...

UTM broke those promises in 1979 and again in February 1980 when the Board of Trustees denied my appeal.

ANY PROMISE, EVEN IF ORAL, IS LEGALLY BINDING. ANY BREACH OF IT MAKES NOT ONLY PROMISER LIABLE FOR DAMAGES BUT ENTITLES PROMISEE THE RELIEF FROM JUDGMENT UNDER THROCKMORTON (page 13).

CONDUCT OF UTM ATTORNEYS

Their conduct is given on pages ii,xix-xxiv, xxviii.
Mr Leadbetter remained silent even when I timely wrote him (page xxiv,xxv).

Even if evidence to prove that UTM attorneys were involved in misdeeds of their witnesses in the court may not be convincing

to the courts, the fact remains that Mr. Leadbetter was timely informed of such misdeeds, preclusion of my constitutional claims, etc, but he remained silent.

The district court misconstrued my statement on Mr. Brogan. What I was trying to say is that UTM counsels are involved in decision-making process.

Dr. McGehee in 1975 responses to EEOC (which is an agency to protect public), with copies to Brogan, made untrue claims but Brogan remained silent.

They have defiled the courts in other cases also.

Their conduct comes under saving clause based on Hazel-Atlas (322 US 238(1944)) and other cases. They also protected UTM from any future liability by precluding my constitutional claims in Jain I as explained on page xix, xx.

CONDUCT OF UTM OFFICIALS IN THE COURT

" So many inconsistencies " in their

testimony in the court shocked the court.

UTM attorneys marshalled heavy weight of testimony in the court by UTM officials (which carried more weight) against my lone testimony. They misled the court into believing that the students complained only against me by concealing the fact that they in greater number complained against other teachers..

In spite of their written statements(I was best mathematician, my English was not hard to understand, enrollement was not declining in 1970, I was hired in 1970 on a new position, etc.) , they testified to the contrary which misled the court into believing something which was not true.

SUCH MISDEEDS TOOK PLACE IN COURT.

Other untrue testimony is not given here because of space limitation.

JUDGE MCRAE

10th. Circuit did say in Bulloch that failure of a judge to perform his judicial

function comes under saving clause of 60(b).

The court in Colledge v. New Hampshire (page x) held that it was the duty of courts to be watchful for the constitutional rights of citizens and any stealthy encroachment thereon.

Rather than being watchful, he precluded my constitutional claims and even rationalized such encroachment in his rulings.

Wright & Miller: Rule 60(b)(6) gives the court ample power to vacate judgment whenever that action is appropriate to accomplish justice...It is indeed judge's duty to order a new trial if he deems it in the interest of justice to do so and may act on the motion of the party or his own initiative.

Although a party may bring the matter (fraud) to the attention of the court, this is not essential, and the court may proceed on its own. Univ. Oil Prod. CO.(page xii).

The above cases and 54(c)(page xv) make it clear that Judge McRae must have given me relief under the constitution when his rulings proved such violations, must have given me/opportunity to present constitutional violation and untrue testimony, etc., when I timely wrote him (page xxiv,xxv,xxvi).

He chose only those facts, paying no attention to other facts (page xx.xxi), which led the decision in UTM's favor. He disregarded tempered evidence and untrue testimony in his court by UTM people.

His hostility towards me surfaced in 1984 which may be real reason for my failures.

A judge should not be biased and prejudiced against one in favor of his opponent- Code 28 U.S.C. (sec. 144).

COURT'S RELIANCE IN BULLOCH AND H.K. PORTER IS MISPLACED

JAIN I	BULLOCH AND H.K. PORTER
Fraud involved attorneys of both sides	Fraud by govt. witnesses and attorneys was not established
Misdeeds occured in the court, also Attorneys & judge precluded my constitutional claims(page xviii-xx)	they occurred in pretrial discovery no such situation claimed
Judge McRae failed to perform judicial function	no such claim made

I was not guilty of laches Bulloch was

False promise UTM made to Neese and Neese made to me	No promises in any of the cases
I was extremely afraid of courts, was not negligent, had to stop after McRae refused to review his ruling in 1978 , my freedom of action severely restricted by economic and other conditions and I had de facto no counsel to advise me	No such claims were made in any of the above cases

LIMITATION PERIOD

It does not start until fraud is discovered, promise is broken, or court's error surfaces. The crucial error on which I failed under 2000e-3 surfaced on 1980 order of the court(page xxi).

Prior to that I believed I had not presented legally sufficient evidence to prove my claims.

Neese broke promise in August 1979, UTM did it in February 1980, and Judge Mc-

Rae's hostility, eclipsed under judicial prerogative, surfaced in July 1984.

POST-1977 CONDUCT OF UTM

Right to sue was issed in May 1983 and I immediately brought this conduct pursuant to Title VII also(page xxx,xxxi). Jurisdiction does exist under 2000e-5(f)(1)-(3).Ford and Fitzpatric (page x).

Right to sue did not direct me to file it in Jain II EEOC knew was filed in 1981. I did inform Judge McRae and Mr. Leadbetter in May 1983 of my having received right to sue(page xxxi)

There was no flaw. Furthermore, the courts in Haines v. Kerner and Maclin v. Spector Freign System (Pages xi) held that pro se cases are held to less stringent standards than pleadings by lawyers and their policy was to be flexible vis-a-vis use of proper form and technicality by pro se plaintiffs.

The courts below have given me no

benefit of such policy and flexibility.

CIVIL RIGHTS BILL OF 1866 AND CIVIL RIGHTS ACT OF 1871

Civil Rights Bill of 1866: whatever legislation is appropriate, that is, adopted to carry out the objectives of the Civil war amendment has in view... and [illegible] to secure to all persons the enjoyment of perfect equality of civil rights... is brought within tbe domain of congressional power, State of S.C. v. Katzenback(page xi)

The benefits of Civil Rights Act of 1866 were intended to be uniform throughout the United States and the protection of the individuals to be afforded by them was not intended to differ from state to state. Basista v. Weir (page x).

§§ 1981 and 1982 of Title 42 originated as a clause of sec. 1 of the 1866 Civil Rights Act, therefore §§ 1981 and 1982 are to be construed in pari materia: if §1982 applies to all discrimination private or public, federal and state so then § 1981. Taylor v. Jones (page xii).

These decisions unequivocally prove that the congress: never intended that 11th. amendment be a bar to a suit under Civil Rights Acts of 1866 and 1871 otherwise protection would differ from state granting waver to state not granting it and the objectives of Civil war amendment would be

frustrated by the states using their sovereign immunity.

It may further be pointed out that the courts have held that a university, even state, is deemed as a person used in §§ 1981-1983. St, Francis Coll. v. AlKhajaraji, Scott v. Univ. of Del, Whitak v. Bd. of Higher Edu & City Univ. of N.K.(pagexii).

The courts have made distinction between state university and state department, like labor department, and have held that later is not a person and could not be sued under the above Acts.

Since 11th. amendment does not apply to a person and a state university is deemed a person, logic says that 11th. amendment would not be a bar to an action under the above Acts. I will also show that UTM is not an arm of a state and is not protected by sovereign immunity.

The district court in its order of August 1986(page A-16) held that most

important factor of Hall is whether payment will come from state treasury. It reversed that order in August 1987 because UTM claimed that award money will come from state.

Mr.Fly, in his affidavit, and the university counsels in their briefs filed in various courts have not disclosed the facts unearthed by me given on page vi which were presented to the courts below who paid no attention to them.

Therefore the decisions of those courts were obtained by not disclosing those facts and those decisions did influence the decisions of the courts below in Jain II.

Since UTM has private money from yearly earnings in interest (about 11 million dollars) and from liability insurance it carried until 1986 that part of August 1986 decision given in A-16 of the court should stand and August 1987 judgment needs to be reversed.

Mr. Fly and Mr. Brogan concealed from the courts the following they stated in their

June 1986 memorandum:

The state in 1984 effected a waver of sovereign immunity to the extent of $300,000 per claimant, and the University of Tennessee and its employees were included within the provision under the term that the University will pay an annual premium into a state fund for coverage against any claim filed with the Claim Commission.

The claim included violation of statutory or constitutional rights.

It may be pointed out that if UTM was indeed an arm of the state neither a provision was needed to include it nor it would have been required to pay annual premium because state agencies are not required to pay and/are automatically covered.

It should make no difference whether a Claims Commission or federal court awards payment.

First, UTM is not an arm of the state and/not protected by sovereign immunity based on given facts. Even if the ultimate determination is that it is/not so, the award could have been limited to $ 300,000 rather than dismiss the suit.

It may also be pointed out that Jain II should have been decided on the basis of the conditions existed in August 1981 when it was filed and UTM had not claimed sovereign immunity in its filings in 1982 and 1983.

The delay of five years by the district court to rule on pending motions should not put me to double jeopardy of so much delay and then dismissal of suit under sovereign immunity.

I have repeatedly pointed out to the courts below that Jain II was brought pursuant to Title VII also but of no avail.

In Calero-Tolado v. Pearson Yacht Leasing Co. (page x), the Supreme Court held that there cannot exist under American flag a governmental authority untrammeled by requirement of due process. Such authority now does exist under sovereign immunity in a state-aided university.

In Kesler v. Dept. of Public Safety (page xi), the Supreme Court held that any

state legislation which frustrates full effectiveness of federal law is invalid by the supremacy clause. See also Reiz v. Measley (314 US 33, 86 L.Ed. 21,62, S.Ct 24 U.S.C.A. Const. art. 6 cl.2) and Perez v. Campbell (92 S.Ct. 1704, 402 US 637 29 L.Ed. 2d. 233)

It is 1977 state legislation which frustrates full effectiveness of federal law that UTM could be sued under the Constitution and violates § 1983 also.

C O N C L U S I O N

Being pro se petitioner(failed even to get research help) , I have presented the authorities and prepared my petition to the best of my ability in proving that (i) res judicata is not a bar to litigate pre-1977 conduct, (ii) sovereign immunity is not a bar to litigate post-1977 conduct under Civil Rights Acts of 1866,1871, and 1964, (iii) I am entitled to relief from judgment in Jain I.

I have also proved that 11th. amendment

is not a bar to post-1977 conduct under the Constitution either since UTM has private money and can still be sued.

Since the only option left for me is the Supreme Court, because of the manner in which I have been deprived of en banc rehearing, I pray and beg for sympathy and grant of writ of certiorari so that I am accorded some justice in U.S.A.

MOST RESPECTFULLY SUBMITTED

M. K. Jain

Mahendra K. Jain, Pro Se Petitioner
201 Meadowbrook Dr.
Martin, Tenn. 38237

CERTIFICATE OF SERVICE

Certified that two copies of the petition and Appendix were mailed to Mr. Ronald C. Leadbetter, Assoc. General Counsel, 810 Andy Holt Tower, University of Tennessee, Knoxville, Tennessee 37996 on the day of 15th June, 1988.

M. K. Jain
Mahendra K. Jain

A P P E N D I X

TABLE OF CONTENTS

No. 87-6068

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAHENDRA KUMAR JAIN,

PLAINTIFF-APPELLANT

v.

THE UNIVERSITY OF TENNESSEE AT MARTIN,

Defendant-Appellee

FILED

APR 06 1988

JOHN P. HEHMAN
Clerk

O R D E R

BEFORE: LIVELY, CHIEF Judge; GUY, Circuit Judge; and COHN, District Judge. *

This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and briefs, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

This pro se plaintiff appeals the district court's judgment dismissing his civil rights complaint.

Seeking monetary and injunctive relief, plaintiff sued the defendant alleging that it discriminated against him on the basis of national origin by denying him salary increases and other

* The Honorable Avern Cohn, U.S. District Judge foe Eastern Dist. of Michigan

sitting by designation

---

promotional opportunities. Plaintiff sued the university but not the individuals allegedly responsible for the discriminatory acts. The district court found the defendant university was an arm of the State of Tennessee and that it was thus entitled to eleventh amendment sovereign immunity.

Upon review, we conclude the district court properly dismissed the complaint.

Accordingly, the district court's judgment is hereby affirmed pursuant to Rule 9(b)(5), Rules of the Sixth Circuit for the reasons set forth in the district court's opinion dated August 18,1987.

ENTERED BY ORDER OF THE COURT

S/ John P. Hehman
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

MAHENDRA KUMAR JAIN,
PLAINTIFF

V.

THE UNIVERSITY OF TENNESSEE AT MARTIN

No. 81-1122

ORDER ON PENDING MOTIONS

Plaintiff Mahendra Kumar Jain filed this action on August 17,1981, alleging that defendant, the University of Tennessee at Martin(UTM), violated his constitutional rights. On November 20,1981, plaintiff filed a petition for judgment by default. Defendant UTM moved to dismiss the complaint and for an award of attorney's fees on January 29,1982. On September 10,1982, Plaintiff Jain moved to amend his complaint to allege grounds to set aside this court's judgment in a prior suit between these parties (Jain v. University of Tennessee at Martin, No. 77-1011 (W.D. Tenn. Dec. 6, 1977)). Finally, on July 14,1983, defendant UTM objected to interrogatories served on it by plaintiff.

In his complaint, plaintiff alleges that defendant UTM vioated his rights under the first, fifth, and fourteenth amendments and 28 U.S.C. §§1981 and 1983. Specifically,

plaintiff alleges that UTM (1) violated his rights to equal protection of the laws by discriminating against him on the basis of national origin, (2) violated his first amendment rights by taking retaliatory action after he complained of discriminatory treatment, (3) violated his rights to due process, (4) breached an employment contract between it and plaintiff in 1971 by failing to give him "continuing employment," and (5) falsely accused him of being a trouble maker and the author of several anonymous memoranda. To redress these alleged wrongs, plaintiff Jain seeks monetary damages, injunctive relief, and an order finding defendant and its attorneys in contempt of court.

II. UTM's Motion to Dismiss and for Attorney's Fees

Defendant UTM moves to dismiss the complaint on January 29,1982, alleging that it is barred by the doctrine of res judicata and by the statute of limitation. In his response to this motion, plaintiff candidly admits that many of the facts upon which the present claims are based are the same facts that he based a Title VII claim on in Jain v.University of Tennessee at Martin, No. 77-1011, Supra. He contends, however, that the present action is a "new

and independent lawsuit" that is not barred by this Court's decision in No. 77-1011.

This Court has reviewed the record of No. 77-1011 and finds that most of the facts alleged in the present complaint were presented in that action. After a two day trial, Judge Robert McRae issed an oral ruling in that cause, in which he found that the acts complained of did not constitute discrimination or retaliation by UTM. See Jain v. University of Tennessee at Martin, No. 77-1011, slip op. at 4,8 (W.D. Tenn. filed May 1, 1978). See also Order on Plaintiff's Answer in No. 77-1011, at 2 (oct. 24,1980)("Plaintiff has repeatedly been informed by this Court that a judicial determination has been made that defendant engaged in neither discriminatory or retaliatory action against plaintiff prior to November 18,1977.")

In spite of the apparent clarity of this Court's ruling on the issues presented in No. 77-1011, plaintiff contends that it does not bar the present action since the present action attacks defendant's actions on constitutional grounds, an allegedly " new and independent" cause of action. As plaintiff contends, the doctrine of res judicata only "bars a second suit on the same cause of action as a previously determined suit." Manning v. Fort Deposit Bank,

619 F.Supp. 1327,1331 (W.D. Tenn. 1985) (citing 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶.410[1] (2d ed. 1984)). The issue, then, is whether the present claim presents a new and independent cause of action.

In this circuit, a cause of action is not independent of a previously litigated claim if there is "an identity of facts creating the right of action and of the evidence necessary to sustain each action." Westwood Chemical Co. v. Kulick, 656 F.2d 1224,1227 (6th. Cir.1981). Thus, the Sixth Circuit Court of Appeals has held that a previously litigated Title VII action bars a later action brought under 42 U.S.C. §1983 when both actions "are based upon the same discriminatory acts." Harrigton v. Vandalia Butler Bd. of Educ., 649 F.2d. 434,.437 (6th Cir. 1981). As noted by that court "[w]hen two successive suits seek recovery for the same injury, ' a judgment on the merits operates as a bar to the later suit even though a different legal theory of recovery is advanced in the second suit.'" Id., quoting Gemer v. Marathon Oil Co., 583 F.2d 830,832 (6th Cir. 1978). This same result has been reached in two cases from the Fifth

Circuit. Fleming v. Travenol Laboratories, Inc., 707 F.2d. 829 (5th Cir. 1983)(prior §1983 action bars later Title VII claim); Nilsel v. City of Moss Point, 701 F.2d. 556 (5th Cir.1983)(en banc)(prior Title VII action bars later §1983 action).

In support of his position that the present action is not barred by the doctrine of res judicata, plaintiff Jain cites cases holding that Title VII does not foreclose a plaintiff from pursuing other remedies for employment discrimination. Davis v. Passmann, 442 U.S. 228 (1979) ; Alexander v. Gardner-Denver Co. 415 U.S. 36 (1974). Plaintiff's characterizations of the Supreme Court's holdings in Davis and Alexander are not inaccurate; however, the Court in those cases did not address the preclusive effect of a Title VII action on a later action based upon a different legal theory but the same operative facts. Harrington, supra . Accordingly, to the extent that plaintiff seeks to relitigate the claims of discriminatory and retaliatory treatment that were adjudicated in No. 77-1011, those claims are barred by the doctrine of res judicata and are hereby dismissed. Because plaintiff alleges acts of discrimination and retali-

ation after November 18,1977, this ruling does not require dismissal of the complaint.

Defendant also raised the statute of limitation in its motion to dismiss, arguing that plaintiff's claims are barred by the one year limitation period of Tenn. Code Ann. §28-3-104 (1980). Because §§ 1981 and 1983 do not contain a statute of limitation, this Court must apply Tennessee's statute of limitation. Board of Regents v. Tomanio, 446 U.S. 478 (1980); Mulligan V. Hazard, 771 F.2d 340,343 (6th Cir. 1984); Wright v. Tennessee, 628 F.2d. 949,951 (6th Cir. 1980).

Under Tennessee law, actions " brought under the federal civil rights statutes... shall be commenced within one (1) year after the cause of action accrued." Tenn. Code Ann. § 28-3-104(a)(1980). Because the present action was filed on August 17,1981, and because it contends that the facts underlying plaintiff's claims all occurred prior to November 18,1977, defendant UTH alleges that the present action is barred by the one year statute of limitation of §28-3-104(a). However, a careful and liberal reading of plaintiff's pro se complaint and accompanying brief shows that plaintiff alleges discriminatory and retaliatory acts during 1980 and 1981, in addition to the

period between 1970 and 1980. See, e.g., Brief in Support of Complaint, at 13,15, 17, and 23. Defendant's motion to dismiss based upon the statute of limitation is thus denied.

Section 1988 of Title 42 permits a prevailing party, including defendants,to recover attorney's fees in actions brought under 42 U.S.C. §§1981 and 1983. See e.g, Smith v. Smythe-Cramer Co., 754 F. 2d. 180 (6th Cir.), cert. denied.__U.S. ___,105 S.Ct. 3530(1985). Because plaintiff has made allegations of discrimination after November 18,1977, that are not patently without merit, his complaint cannot be said at this time to be "frivilous, unreasonable, or without foundation." Christiansburg Garment Co.v. EEOC, 434 U.S. 412,421 (1978) (Title VII action);Tarter v. Raybuck,742 F.2d. 977, 985-86 (6th Cir.1984), cert. denied,___U.S.___,105 S.Ct. 1749 (1985) (Christianburg standards apply to § 1983 actions). Defendant's request for attorney's fees is thus premature and is denied with leave to renew the request at a later date.

III. Jain's Motion to Amend His Complaint

Plaintiff Jain moved to amend his complaint on September 10,1982, to include a " motion to relieve him of the judgment in suit No. 77-1011 under rule 60(b) of Fed.

R.Civ.P. on the ground that 'fraud was committed upon the court' by defendant." This fraud allegedly consists of (1) a conflict of interest on the part of Jain's attorney in No. 77-1011 in proceeding against his alma mater, (2) acts of defendant's officials to cover-up and withhold evidence, (3) presentation of false evidence, (4) intimidation of plaintiff and witnesses, and (5) violation of "ABA codes" by defendant's attorneys.

Rule 60 of the Federal Rules of Civil Procedure permits a court to set aside a judgment for various reasons, including fraud. That rule, however, sets a one year period in which to make such a motion. In no. 77-1011, plaintiff Jain filed a Rule 60(b) motion, alleging that his attorney's representation and the defendant's actions warranted setting aside of the judgment in that case. That motion was denied by this Court on the ground that it was not timely filed. See Jain v. University of Tennessee at Martin, No. 77-1011, order on plaintiff's Motions, at 5 (W.D. Tenn. Aug. 8,1980).That decision was affirmed by the Sixth Circuit Court of Appeals on April 9,1981. Jain v. University of Tennessee at Martin, 657 F. 2d. 267 (6th Cir. 1981)(mem.).

Plaintiff does not now contest that rul-

ing, but alleges that fraud on the court warrants relief from a judgment at any time. The term " fraud on the court" refers to fraud that "subvert(s) the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudicating cases." 7 J. Moore & J. Lucas, Moore's Federal Practice 60.33, at 60-360 (2d ed. 1985). Cf. 11C. Wright & A. Miller, Federal Practice and Procedure, §2870, at 253-54 (1973)(no fraud on court if the alleged wrong " was only between the parties in the case and involved no direct assault on the integrity of the judicial process").

In this case, plaintiff alleges that various acts by his attorney and by defendant's employees and attorneys amount to fraud on this Court. In Support of that position, plaintiff relies principally on Bulloch v. United States, 95 F.R.D. 123 (D. Utah 1982), for the position that certain conduct by one party in an action may amount to fraud on the court. In Bulloch, the trial court found that the defendant had committed various acts of misconduct, including making false representation, pressuring witnesses not to testify, concealing or withholding testimony, and

deceptively answering interrogatories. Id. at 144. According to Bulloch court, these acts amounted to a manipulation by the defendant of the processes of the court to its advantage. This decision, however, was reversed in 1985. Bulloch v. United States, 763 F.2d. 1115 (10th Cir.1985), cert. denied, U.S. ___,106 S.Ct. 862 (1986). According to the appellate court, " fraud between the parties or fraudulent documents, false xxx statements, or perjury" are not the kind of fraudulent acts that constitute "fraud on the court." 763 F.2d at 1121. Cf. Moore's Federal Practice, supra, at 60-360-362 (" Fraud inter parties, without more, should not be a fraud upon the court, but redress should be left to a motion under 60 (b)(3) or to the independent action.").

The allegations made by plaintiff in his motion do not present evidence of any fraud on this Court. Plaintiff's dissatisfaction with his attorney's representation was the subject of the Rule 60(b) motion made in No, 77-1011 that was denied by this Court and affirmed by the court of appeals. Although misconduct by an attorney may constitute fraud on the court, see, e.g., H,K. Porter Co. v. Goodyear Tire & Rubber Co., 536 F.2d. 1115,1118-19 (6th Cir.1976), the facts alleged by plaintiff are not suff-

icient to find that defendant's attorneys committed a fraud upon this Court. As an example, plaintiff cites a letter by attorney Brogan in which Mr. Brogan stated that he had carefully examined plaintiff's complaint and that, in his opinion, it was without merit. According to plaintiff, this is proof that Mr. Brogan was involved in an attempt by defendant to cover-up its allegedly wrongful conduct. No fraud on the court is shown by this or the similar allegations contained in the motion.

With respect to his allegation that defendant presented false evidence and testimony, plaintiff offered no proof other than the allegations of his complaint.Those allegations simply restate plaintiff's versions of the facts of this case, including the time period previously litigated in No. 77-1011, and are insufficient evidence of fraud on the court. Plaintiff also alleged that defendant has created a climate of fear on the UTM campus, thereby intimidating its employees from taking actions to correct allegedly discriminatory practices. Even if this allegation is accepted as true, it does not constitute fraud on the court. Finally, plaintiff alleged that defendant's attorneys have violated "ABA codes." Again , even if that allegation is

true, it is not fraud on the court as that term is used in Rule 60(b).

Although leave to amend should be freely granted, it is not abuse of discretion to deny leave to amend if the proposed amendment is frivilous on its face. Because the evidence offered in support of the proposed amendment shows that it is without merit, plaintiff's motion to amend his complaint is denied.

V. Summary

In summary, plaintiff's petition for a default judgment is denied. Defendant's motion to dismiss is granted to the extent that the complaint alleges discriminatory or retaliatory acts that were litigated by this court in Jain v. University of Tennessee at Martin, No. 77-1011, and denied in all other respects. Plaintiff's motion to amend his complaint is denied.

IT IS SO ORDERED

S/ James D. Todd
United States District
Judge
May 28,1986

NOTE: THE PART WHICH IS NOT RELEVANT TO WRIT OF CERTIORARI HAS NOT BEEN TYPED ABOVE

UNITED SATES DISTRICT COURT

WETSERN DISTRICT OF TENNESSE
EASTERN DIVISION

MAHENDRA Kumar Jain,

V.

UNIVERSITY OF TENNESSEE AT MARTIN

JUDGMENT IN A CIVIL CASE

CASE NUMBER 81-1122

Decision by Court. This action came to consideration before the Court. The issues have been considered and a decision nas been rendered.

IT IS ORDERED AND ADJUDGED that in compliance with the Memorandum Opinion and Order entered in the above styled matter on August 17,1987, Defendant UTM's motion for summary judgment is granted and this case is hereby DISMISSED.

APPROVED

S/ JAMES D. TODD
UNITED STATES DISTRICT JUDGE

08-18-87
Date

J. FRANKIN REID
Clerk

S. Nichols
(by) Deputy Clerk

IMPORTANT STATEMENT TAKEN FROM DISTRICT ORDER DATED AUGUST 6,1986

LAST PARA: The most important factors, according to Hall, are whether payment of any judgment would actually come from the State treasury and whether the university has the funds or power to satisfy a monetary judgment. 742 F. 2d. at 304. Theses factors cannot be adequately assessed on the basis of the record as it now exists. There can be no doubt that the university receives substantial portion of its funds from the state; however, the extent of that funding and the relationship between state appropriated funds and non-state appropriated funds (e.g. alumni gifts) are not in record. Because a determination of this issue requires consideration of matters that have not been presented to this court, UTM's motion to dismiss must be, and is, denied. This denial is expressly made with leave to raise the defense of sovereign immunity in a properly supported motion for summary judgment, if UTM so desires.

IT IS SO ORDERED

S/ James D. Todd
UNITED STATES DISTRICT JUDGE

DATE August 6,1986